

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STEVEN J. BANK,

Petitioner,

V.

THE HONORABLE DIANA SULLIVAN *et al*

Respondents.

Case No. 2:22-cv-01710-CDS-NJK

ORDER

[ECF No. 1]

11 Petitioner Steven J. Bank (“Bank” or “Petitioner”) paid his filing fee and filed a petition
12 for writ of habeas corpus under 28 U.S.C. § 2241, seeking federal review related to his ongoing
13 state criminal case and pretrial detention. ECF No. 1. This matter comes before the Court on
14 initial review under the Rules Governing Section 2254 Cases (“Habeas Rules”). For the reasons
15 discussed below, the Court finds that federal abstention is required, so the petition is dismissed
16 without prejudice.

A. BACKGROUND¹

18 On October 10, 2022, the State filed a criminal complaint charging Bank with assault
19 with the use of a deadly weapon. His case, *State of Nevada v. Steven Javier Bank*, Case No. 22-CR-
20 039899, remains pending before the Las Vegas Justice Court. Indeed, it appears that Bank just
21 had his initial appearance in the matter on October 11, 2022, and he is currently out on bond.

In his petition for federal habeas relief, Bank alleges that (1) the Las Vegas Metropolitan Police Department did not properly administer his rights under *Miranda*, (2) the Las Vegas Metropolitan Police Department did not attempt to ascertain the identity of the alleged victim, who had been pretending to be a part of a work crew when he was actually “a junkie or heroin addict casing” a property across the street from Bank’s property, and (3) Bank was not carrying a

¹ The procedural history in this section is derived from Bank's allegations as well as his criminal matters in the Las Vegas Justice Court. This Court takes judicial notice of the Las Vegas Justice Court online docket.

1 concealed weapon—rather it was only a “bb pistol”—when he warned the alleged victim to
 2 leave. ECF No. 1 at 2, 5–7. Bank asks this Court to grant his writ and order the return of his air
 3 rifle and CO₂ pistol. *Id.* at 7.

4 **B. DISCUSSION**

5 Habeas Rule 4 requires federal district courts to examine a habeas petition and order a
 6 response unless it “plainly appears” that the petitioner is not entitled to relief. This rule allows
 7 courts to screen and dismiss petitions that are patently frivolous, vague, conclusory, palpably
 8 incredible, false, or plagued by procedural defects. *See Valdez v. Montgomery*, 918 F.3d 687, 693 (9th
 9 Cir. 2019); *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (collecting cases). Because a
 10 federal habeas petitioner incarcerated by a state must give state courts a fair opportunity to act
 11 on each of his claims before he presents them in a federal habeas petition, federal courts will not
 12 consider his petition for habeas relief until he has properly exhausted his available state
 13 remedies for all claims raised. *See Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998).

14 A claim remains unexhausted until the petitioner has given the highest available state
 15 court the opportunity to consider the claim through direct appeal or state collateral-review
 16 proceedings. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999); *Peterson v. Lampert*, 319 F.3d 1153,
 17 1158 (9th Cir. 2003) (en banc). To properly exhaust state remedies on each claim, the habeas
 18 petitioner must “present the state courts with the same claim he urges upon the federal court.”
 19 *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional implications of a claim, not
 20 just issues of state law, must have been raised in the state court to achieve exhaustion. *Woods v.*
 21 *Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014); *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir.
 22 2005) (fair presentation requires both the operative facts and federal legal theory upon
 23 which a claim is based). A claim is not exhausted unless the petitioner has presented to the state
 24 court the same operative facts and legal theory upon which his federal claim is based. *Bland v.*
 25 *California Dep’t of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994).

26 Bank has not alleged or demonstrated that he has fully exhausted his state court
 27 remedies. Indeed, Bank stated that he has not appealed any decision, filed a grievance, or sought
 28 an administrative remedy. *See* ECF No. 1 at 2; *see, e.g., Arevalo v. Hennessy*, 882 F.3d 763, 764–67 (9th

1 Cir. 2018) (finding that California petitioner properly exhausted his state remedies by filing two
 2 motions in the trial court, a habeas petition in the court of appeal, and a habeas petition in the
 3 state supreme court, each of which was denied).

4 But even if this Court assumes that Bank has exhausted his claims, he seeks federal
 5 judicial intervention in a pending state criminal proceeding, which is simply not available to
 6 him. *Cf. e.g., Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983); *Carden v. Montana*, 626 F.2d 82,
 7 83–85 (9th Cir. 1980). The comity-based *Younger* abstention doctrine prevents federal courts
 8 from enjoining pending state court criminal proceedings, even if there is an allegation of a
 9 constitutional violation, unless there is an extraordinary circumstance that creates a threat of
 10 irreparable injury. *Younger v. Harris*, 401 U.S. 37, 53–54 (1971). The United States Supreme Court
 11 has instructed that “federal-court abstention is *required*” when there is “a parallel, pending state
 12 criminal proceeding.” *Sprint Commc’ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013) (emphasis added);
 13 *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) (federal courts generally abstain from granting
 14 any relief that would interfere with pending state judicial proceedings). Injuries are only
 15 irreparable if the threat to a petitioner’s federally protected rights cannot be eliminated through
 16 his defense of the criminal case. *Younger*, 401 U.S. at 46.

17 This case does not present extraordinary circumstances. Bank challenges law
 18 enforcement’s arrest and investigation. Defendants in state criminal proceedings routinely allege
 19 that state criminal proceedings violate their constitutional rights, including fundamental rights,
 20 which makes this a common occurrence, not an extraordinary circumstance. Bank’s situation is
 21 similar to that of any criminal defendant facing the potential loss of constitutional rights—
 22 including the most fundamental right, to liberty—in a pending criminal prosecution. In
 23 addition, Bank’s pretrial motion practice or defenses at trial may ameliorate any threat to his
 24 federally protected rights. He thus faces no extraordinary or irreparable injuries, so federal
 25 abstention is required. Because the charges against Bank are still pending, dismissal of this
 26 action without prejudice will not materially impact the analysis of any issue in a later-filed
 27 habeas proceeding or otherwise result in substantial prejudice.

1 C. CONCLUSION

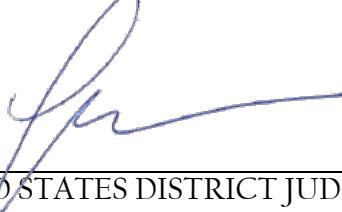
2 IT IS THEREFORE ORDERED that Petitioner Steven J. Bank's petition for writ of
3 habeas corpus [ECF No. 1] is DISMISSED without prejudice.

4 IT IS FURTHER ORDERED that a certificate of appealability is denied, as jurists of
5 reason would not find dismissal of the petition to be debatable or wrong.

6 IT IS FURTHER ORDERED that the Clerk of the Court is directed to informally
7 electronically service Respondents under Rule 4 of the Rules Governing Section 2254 Cases by
8 adding Nevada Attorney General Aaron D. Ford as counsel for respondents and sending a notice
9 of electronic filing to his office of the petition [ECF No. 1] and this order. No response is
10 required from Respondents other than to respond to any orders of a reviewing court.

11 IT IS FURTHER ORDERED that the Clerk of the Court is directed to enter final
12 judgment dismissing this action without prejudice and close this case.

13 DATED: October 13 2022

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16 UNITED STATES DISTRICT JUDGE

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